BRIEF IN SUPPORT OF PETITION

Statement

The attention of the Court is respectfully invited to the petition, which contains a statement of the facts and other matters here pertinent. In the interest of brevity these will not be repeated.

Specifications of Error

The Circuit Court of Appeals for the Third Circuit erred in the instant case:

(1) In holding that "The Supreme Court expressly left open all questions relating to the validity of '149 or its infringement by the appellant's processes, aside from the defense of prior public use which was held not to have been made out."

(2) In holding that the invention of Japanese Patent 42,563 is substantially identical with that of claim 2 of U. S. Patent 1,584,149.

(3) In holding that the invention of Japanese Patent 41,728 is substantially identical with that of claim 1 of U. S. Patent 1,584,149.

(4) In holding that claim 1 of U. S. Patent 1,584,149 is invalid in view of the prior art.

(5) In not holding claims 1 and 2 of U. S. Patent 1,584,-149 to be good and valid in law.

(6) In holding that "where an operable process is claimed (alternatively in the same claims) in a patent with

an inoperable one, the operable one must be held to constitute the invention."

(7) In holding that the heavy burden of proof resting on defendant to establish identity of invention between Japanese Patents 41,728 and 42,563 and U. S. Patent 1,584,149 has been met.

(8) In holding that if Japanese Patent 42,563 "had been issued in this country, we think that Shimadzu would have been entitled to a monopoly in the field."

(9) In failing to concur in the views expressed in the dissenting opinion of said court.

(10) In holding invalid U. S. Patent 1,584,149 under the patent statutes by reason of the patenting of the invention thereof in Japanese Patents 41,728 and 42,563, a question previously set at rest by this Court.

(11) In not holding Japanese Patents 41,728 and 42,-563 are expressly limited to processes completely different from that disclosed and claimed in U. S. Patent 1,584,149.

(12) In holding that under the patent statutes Japanese Patent 42,563, disclosing and claiming two inconsistent processes alternatively in the same claims, one of which might be operable and the other of which is inoperable, invalidates claim 2 of U. S. Patent 1,584,149.

(13) In not holding that Japanese Patent 42,563, disclosing and claiming two inconsistent processes alternatively in the same claims, is not a bar to the validity of U. S. Patent 1,584,149 under the patent statutes.

(14) In not holding that defendant is estopped from urging after remand by this Court that Japanese Patents 41,728 and 42,563 are for the same invention as U. S. Patent 1,584,149 under the patent statutes.

(15) In holding that a person skilled in the art following the disclosure of U. S. Patent 1,584,149, covering "an operable process, the same invention claimed" in U. S. Patent 1,584,150, would obtain similar results by following the teachings of Japanese Patent 42,563.

(16) In not holding that Japanese Patent 42,563 teaches, discloses and claims the use of air in an inert manner.

(17) In holding that a person skilled in the art following the teachings of Japanese Patent 42,563, disclosing and claiming in the same claims two inconsistent processes alternatively "one, operable to produce substantial quantities of lead powder; the other, inoperable to that end", would be presumed to choose the operable process.

(18) In holding that under the patent statutes Japanese Patents 41,728 and 42,563 invalidate claims 1 and 2 respectively of U. S. Patent 1,584,149.

(19) In not reversing the decree of the District Court holding claim 1 of U. S. Patent 1,584,149 invalid in view of prior art.

(20) In not affirming the decree of the District Court that claim 2 of U. S. Patent 1,584,149 is valid and infringed.

(21) In not awarding plaintiffs an injunction and an accounting as prayed for in the bill of complaint.

ARGUMENT

POINT I

In holding invalid U. S. Patent 1,584,149 under R. S. 4887 by reason of the patenting of the invention thereof in a foreign country on an application filed more than twelve months prior to the filing of the application for the aforesaid U. S. Patent, the Circuit Court of Appeals decided a question previously set at rest to the contrary by this Court and thus so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

When a case has been decided by this Court and remanded to the lower courts, whatever was before this Court and determined by it must be considered as finally settled as the law of the case. Especially is this so where the parties and the record in the proceedings, as here, are the same. (*In re Sanford Tool Co.*, 160 U. S. 247.)

Likewise, the rulings and findings of the District Court concurred in by the Circuit Court of Appeals and either adopted or not set aside by this Court on review are no longer open to question as between the parties. (*General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464.)

In applying this well established rule of law to the present case, we find the following:

(1) Defendant in its answer pleaded that Japanese '728, application for which was filed November 20, 1920 and which thereafter issued on February 13, 1922, and Japanese '563,

application for which was filed November 27, 1920 and which thereafter issued on May 10, 1922, constituted a bar under R. S. 4887 to U. S. '149 (R. I. 29, 34).

(2) The District Court, after careful examination of these Japanese patents, held that they were not for the same inventions as the patents then in suit, including both U. S. '149 and '150, and held claims 1 and 2 of U. S. '149 valid and infringed (R. II 1169-1172, 1187, 1189; 17 F. Supp. 42).

(3) The Circuit Court of Appeals for the Third Circuit affirmed the decree below (R. IV 1272; 98 F. [2d] 831).

(4) Defendant in its petition for certiorari to this Court acknowledged that it was bound by the concurrent findings of the courts below as to this issue (No. 441 October Term 1938) and stated (p. 3):

> *"The courts below found that he* (Shimadzu) *had no foreign patent equivalent to his patent No. 1,584,149."*

After certiorari was granted, defendant (then petitioner) in its brief on argument (p. 4) conceded:

> *"The questions here presented arise from facts not disputed and from concurrent findings of fact of both courts below."*

(5) This Court in its opinion took the defendant at its word that no controversy of fact was involved and that defendant conceded that it must accept the concurrent findings of the courts below (R. IV 1280; 307 U. S. 5, 9).

In addition, although this Court took cognizance of the state of the pleadings and the record before it as to this issue, it did not disturb the findings below.

(6) As the District Court stated that the validity of U. S. '149 might be doubtful *in view of the prior art*, this Court held that the defendant was entitled to a re-examination of the questions of validity and infringement as to this patent, and remanded the cause to the District Court for this purpose.

(7) Upon remand the District Court again held claim 2 of U. S. '149 valid and infringed but claim 1 thereof to be invalid in view of the prior art (R. IV 1311; 35 F. Supp. 745). Although defendant vigorously contended that Japanese '728 and '563 under R. S. 4887 invalidated U. S. '149, that court, in conformity with its original opinion, did not so find. Plaintiffs there contended that this issue was no longer open as between the parties.

(8) Defendant appealed to the Circuit Court of Appeals for the Third Circuit because the decree held claim 2 of U. S. '149 valid and infringed, and plaintiffs appealed from that part of the decree below holding claim 1 to be invalid.

The Circuit Court of Appeals, notwithstanding the foregoing and the law of the case as settled by the applicable decisions of this Court and of other Circuit Courts of Appeals, permitted defendant to prevail by holding that Japanese '728 and '563 are substantially identical with the invention claimed in claims 1 and 2 respectively of U. S. '149.

The above brief review reveals conclusively that defendant had its day in court on the issue of whether Shimadzu's Japanese patents constitute a bar to U. S. '149 under R. S. 4887; that this issue was resolved against defendant by the concurrent holdings of the courts below, which on certiorari were not disturbed by this Court. The defendant should not have been permitted to resurrect this defense in the proceedings on remand.

If the decision of the Circuit Court of Appeals is permitted to stand, there would be no end to the determination of issues between the same parties and the established rule as to the finality of concurrent findings in the federal courts would be thrown into confusion. Manifestly the Circuit Court of Appeals by its decision has so far departed not only from the settled law but from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. *Sibbald* v. *United States,* 12 Peters 488; *Illinois* v. *Ill. Central R. R. Co.,* 184 U. S. 77; *Sorensen* v. *Pyrate Corp.,* 65 F. (2d) 982 and cases cited.

POINT II

In allowing the defendant to prevail on a defense, the establishment of which required defendant to repudiate representations which it made to this Court and upon which it relied in seeking a review of the case by this Court by petition for writ of certiorari and in presenting the case on argument, the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

When this case was previously in this Court on certiorari, defendant (then petitioner) in its petition to this Court for certiorari in No. 441, October Term 1938, advanced three reasons for allowance of the writ. The third reason was as follows (Defendant's Petition for Certiorari, p. 7):

> "(3) In holding valid a United States patent granted to one who had made an invention in a foreign country, but who withheld and suppressed it for a

long period of time and did not file an application for a U. S. patent therefor *until more than two years after the thing subsequently patented had been brought into commercial use by others in this country,* the Court below decided an important question of federal law in a way probably in conflict with an applicable decision of this Court."

In its brief on argument (p. 31) defendant stated:

"As Shimadzu was filing applications for patents in Japan and elsewhere after August 1919, *but delayed filing any application anywhere for the inventions of the patents here in suit until long after the same or like inventions had gone into commercial use in this country,* it would seem manifest under the foregoing authorities that the inventions of the patents in suit (including U. S. '149) and each of them must be deemed to have been concealed, suppressed or abandoned and that those patents must therefore be adjudged invalid."

August 1919 has been established as the date when Shimadzu made the invention of U. S. '149.

The commercial use above referred to is defendant's commercial use, which has been established as having commenced during June 1921.

Applications for both Japanese '728 and '563 were filed during the period between August 1919 and June 1921.

Application for U. S. '149 was filed January 30, 1922, well within two years of June 1921. Defendant has, therefore, admitted that neither of these Japanese patents is for the invention of the U. S. '149.

In addition, defendant conceded that the questions then presented to this Court arose from facts not disputed and from concurrent findings of fact of both courts below. On

the basis of the foregoing record this Court rendered its previous decision in this case (307 U. S. 5).

Plainly, therefore, the Circuit Court of Appeals in entertaining and sustaining the defense that Japanese '728 and '563 constituted bars to the validity of U. S. '149 has so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Should this Court sanction such practices by parties litigant, the orderly rule of law established to the contrary by this Court and other Circuit Courts of Appeals would be rendered meaningless.

This Court, in *Davis* v. *Wakelee,* 156 U. S. 680, 689, stated:

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

See also, *Phila., Wilmington & Baltimore R. R. Co.* v. *Howard,* 13 How. 307, 337; *Michaels* v. *Olmsted,* 157 U. S. 198; *Officer* v. *J. L. Owens Co.,* 252 Fed. 337 (8 C. C. A.); *Davis* v. *Cornwall,* 68 Fed. 522, 524 (2 C. C. A.); *Smith* v. *Boston Elev. Ry. Co.,* 184 Fed. 387, 389, 390 (1 C. C. A.); *Kintner* v. *Atlantic Communication Co.,* 240 Fed. 716 (2 C. C. A.).

POINT III

Where a party urging foreign patents as a bar to a U. S. patent under R. S. 4887 maintains, in proceedings below after remand that the processes of such patents are different from that ultimately found concurrently by the courts below to be covered by the U. S. patent, the Circuit Court of Appeals, in sustaining said defense notwithstanding, has decided an important question of Federal law in a manner probably in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeals.

Defendant consistently contended in all the proceedings heretofore had herein that U. S. '149 was inoperative.

It also consistently contended that although Japanese '728 and '563 are inoperative, they are for the same invention as claims 1 and 2 respectively of U. S. '149; that these patents teach that oxidation is to be avoided and that the only function of the air in U. S. '149 and Japanese '563 is to blow the powder, when formed, from the mill; that these patents instruct the avoidance of elevated temperature (Appendix, pp. 5, 6).

The parties are in accord that without oxidation or elevated temperature, no product can be produced.

The courts below, however, have concurrently found that the inventions of U. S. '149 and U. S. '150 are the same, that both are operable and constitute an invention of "high order" that revolutionized the art.

Not only has defendant failed to sustain its heavy burden of establishing identity of invention between the Japanese patents and U. S. '149, it has never even contended that either Japanese '728 or '563 is for the meritorious process which the courts below have concurrently found to be covered by U. S. '149.

The Circuit Court of Appeals notwithstanding held that the two Japanese patents are for substantially the identical invention of U. S. '149.

It will, therefore, at once be seen that the contention advanced by the defendant in the proceedings heretofore had and the decision of the Circuit Court of Appeals are based on wholly different grounds.

It is axiomatic that a defendant bears a heavy burden in invalidating a meritorious invention covered by a U. S. patent. Particularly is this so where a foreign patent is pleaded as a bar under the patent statutes. *Westinghouse* v. *Stanley,* 138 Fed. 823 (1 C. C. A.); *Davis* v. *Milburn,* 1 F. (2d) 227 (2 C. C. A.); *American Tri-Ergon Corp.* v. *Paramount Publix,* 71 F. (2d) 153 (2 C. C. A.); *Stead Lens Co.* v. *Kryptok Co.,* 214 Fed. 368 (8 C. C. A.).

The effect of the decision below is that, contrary to the contention of defendant, the Circuit Court of Appeals, on a different ground than that advanced, has invalidated a valuable U. S. patent. Obviously such a holding on an important question of Federal law of general interest in conflict with the applicable decisions of other Circuit Courts of Appeals should be reviewed and settled by this Court.

POINT IV

Where a foreign patent urged as a defense under R. S. 4887 has been held by the Circuit Court of Appeals to claim alternatively IN THE SAME CLAIMS two inconsistent processes, one of which is operable and the other inoperable, and that Court has disregarded the inoperable process and the inconsistency of the entire document and held that the operable process constitutes the invention of the foreign patent for the purpose of invalidating an otherwise meritorious U. S. patent, the court below has decided an important question of Federal law probably in conflict with applicable decisions of other Circuit Courts of Appeals, which has not been but should be settled by this Court.

Japanese '563 urged by the defendant and sustained by the Circuit Court of Appeals as a defense under R. S. 4887 as comprising the identical invention of claim 2 of U. S. '149, discloses that the invention is an improvement over Japanese '728 and "consists of blowing *air or some other kind of inactive gas like nitrogen* into a rotating vessel, while it is rotating, to forcibly blow out all the particles" and claims the step of "blowing currents of *air or other inactive gases* into the vessel during rotation to force the small particles produced by rubbing out of the vessel" *in the same claims* (R. III, 1251-1254).

The District Court found that the words "or other inactive gases" were words of limitation with respect to the word "air," that this patent "must be read as a disclosure of the use of an inert or inactive medium which will not oxidize lead, and as nothing more" (R. IV, 1444; 35 F. Supp. 748).

The Circuit Court of Appeals held that Japanese '563 discloses both an operable and an inoperable process by reason of the use of the words "air or other inactive gases." It apparently confused the real meaning and import of this phrase. It stated:

> "While we think that the phrase contained in '563 'or some other kind of inactive gas, like nitrogen' may serve to qualify the word 'air' which immediately precedes it, even if this were not so and the quoted phrase be given a separate and distinct meaning apart from its context and unconnected with the preceding word 'air,' Shimadzu, none the less, disclosed a process which was as fully operable to a person skilled in the art as that disclosed by '150. In fact in '563 the inventor has claimed two processes: one, operable to produce substantial quantities of lead powder; the other, inoperable to that end. * * * We think that where an operable process is claimed in a patent with an inoperable one, the operable process must be held to constitute the invention" (R. IV, 1479; 123 F. (2d) 890, 897).

It is thus obvious that the Circuit Court of Appeals fell into a series of errors in its disposition of this point, in that

(1) It held that in the expression "air or some other inactive gas, like nitrogen" the words "or some other kind of inactive gas, like nitrogen" were used to qualify the word "air," and at the same time that these words set forth two processes, one operable and the other inoperable. Obviously these interpretations are mutually exclusive.

(2) It then evolved its novel ruling, set forth above, with respect to a foreign patent which claims both an operable and an inoperable process, in the alternative *in the same claims,* as a defense under R. S. 4887 to a U. S. patent disclosing and claiming only an operable process.

The injustice of such a ruling is readily apparent. It may frequently result in the invalidating of otherwise meritorious U. S. patents by reason of prior foreign patents which may, by judicial construction, be limited so as to read on the invention of the U. S. patent but which, when considered in their entirety, are found to be for a radically different invention.

> "A document so obscure in its terminology that two conflicting theories may be deduced therefrom and supported by equally plausible arguments is too indefinite to be utilized as an anticipation." (*Cimiotti Unhairing Co.* v. *Comstock Unhairing Co.*, 115 Fed. 524.)

The rule is well established in other Circuit Courts of Appeals that

> "A patent, like any other instrument of conveyance or grant, may be of doubtful meaning, or it may contain several meanings suitable to varying expected conditions; but it cannot have two meanings inconsistent with each other." (*Kintner* v. *Atlantic Communication Co.*, 240 Fed. 716, 720, 721 (2 C. C. A.).)

See also, *Atlantic, Gulf & Pacific Co.* v. *Wood*, 288 Fed. 148 (5 C. C. A.); *Hillard* v. *Fisher Book Typewriter Co.*, 159 Fed. 439 (2 C. C. A.); *Stead Lens Co.* v. *Kryptok Co.*, 214 Fed. 368 (8 C. C. A.).

It is also firmly settled that a foreign patent to be a bar to a U. S. patent under R. S. 4887 must be valid. *Cimiotti Unhairing Co.* v. *Comstock Unhairing Co.*, 115 Fed. 524 (C. C. S. D. N. Y.); *Hennebique Const. Co.* v. *Myers*, 172 Fed. 869 (3 C. C. A.).

It is likewise well settled that a U. S. patent may not be invalidated under R. S. 4887 by a foreign patent unless

the invention claimed in the foreign patent is identical with that of the former. *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, 213 U. S. 301; *American Tri-Ergon Corp.* v. *Paramount Publix*, 71 F. (2d) 153 (2 C. C. A.), reversed on other grounds 294 U. S. 464.

It is apparent that as to this point the court below decided an important question of Federal law contrary to the applicable decisions of other Circuit Courts of Appeals.

It is not believed that this precise question has been decided by this Court. The decision below raises an important problem of general interest which should be settled by this Court.

POINT V

Where it has been established on the record that Shimadzu was a pioneer inventor of the process of U. S. '149, thereby negativing the existence of prior art in respect thereof, in holding that claim 1 thereof is invalid in view of prior art without particularizing as to which prior art was considered to be of invalidating effect, the Court of Appeals decided an important question of Federal law which has not been but should be decided by this Court.

Both the District Court and the Circuit Court of Appeals have assigned to Shimadzu the status of a pioneer inventor of the process of U. S. '149. No one prior to his invention was able to develop a process for manufacturing the finely divided lead product which Shimadzu obtains so readily and economically and which is so eminently suited for use in the manufacture of active material for storage

battery plates, by rumbling pieces of lead in a dry state in a rotatable mill.

The Circuit Court of Appeals in discussing this point stated:

> "By blowing air into the cylinder Shimadzu revolutionized the art of making fine lead powder" (R. IV, 1476; 123 F. (2d) 890, 896).

The existence of a pioneer invention would appear to exclude the existence of any prior art in respect thereof. Neither the District Court nor the Circuit Court of Appeals in holding claim 1 of U. S. '149 invalid "in view of the prior art" particularized as to which prior art was considered to be of invalidating effect.

The novel question which should be settled by this Court is whether, where the lower courts have by concurrent holdings established that the process of the patent in suit is a pioneer invention, thereby negativing the existence of prior art, said lower courts may at the same time hold a claim of the patent to be invalid "in view of the prior art" without particularizing as to what prior art is responsible for the invalidating of the claim. In the instant case the indications are that there is none.

It is important that this Court should decide the foregoing question for the benefit of all future parties plaintiff in patent infringement suits to the end that issues of validity shall be more clearly resolved.

POINT VI

Where one patent is held invalid by this Court solely by reason of prior public use and the bill is dismissed as to it pursuant to this Court's mandate, but another patent to the same inventor applied for earlier, applications for both of which patents were copending in the U. S. Patent Office, is remanded to the courts below for further proceedings and, upon such proceedings, the remanded patent is concurrently held by the courts below to disclose the same invention as the invalidated patent, and it manifestly appears that, under the applicable decisions of this Court, the claims in the invalidated patent which read on the disclosure of the remanded patent are entitled to the benefit of the earlier filing date of the application for the remanded patent, and said remanded patent is not subject to the prior public use bar, the sole ground upon which this Court invalidated the later filed patent, but the courts below have no jurisdiction under the aforesaid mandate to apply the law established by this Court and plaintiffs likewise cannot there seek remedy, there arises a novel question of Federal law, apparently without precedent, which has not been but should be reviewed and settled by this Court in order to do complete equity and to avoid confusion.

The District Court in its opinion on remand (R. IV, 1445, 1446, 35 F. Supp. 749) held that U. S. '149 and U. S. '150 are for the same invention, U. S. '150 being an elaboration of what was inherent in U. S. '149.

The Circuit Court of Appeals held that " '149 discloses an operable process, the same invention claimed in '150,

and this serves to limit the issues before us" (R. IV, 1478, 123 F. (2nd) 897).

The application for U. S. '149 was filed January 30, 1922; that for U. S. '150 on July 14, 1923. When this case was previously considered by this Court it found the claims in suit of U. S. '150 (and of U. S. '020 as well) to be invalid solely by reason of defendant's commercial production commenced during June 1921, and remanded the case to the District Court with directions to dismiss the bill as to those two patents. This Court further held that "The defense of prior public use is not made out against patent 1,584,149," it having been filed well within the two year period dating from the commencement of defendant's commercial production (R. IV, 1290, 1291; 307 U. S. 20, 21).

This Court has established the rule that where two patents issued to the same inventor were copending in the Patent Office, but the applications therefor were filed on different dates, those claims in the patent maturing on the later filed application which read upon the disclosure of the patent maturing on the earlier filed application are given the filing date of the earlier for substantially all purposes.

This Court in *Chatman et al.* v. *Wintroath,* 252 U. S. 126, 137, said:

> "To this we must add that not only have later or divisional applications not been dealt with in a hostile spirit by the courts, but, on the contrary, designed as they are to secure the patent to the first discoverer, they have been favored to the extent that where an invention clearly disclosed in an application, as in this case, is not claimed therein but is subsequently claimed in another application, the original will be deemed a constructive reduction of the invention to practice and the later one will be

> given the filing date of the earlier, with all of its priority of right. *Smith & Griggs Manufacturing Co.* v. *Sprague,* 123 U. S. 249, 250; *Von Recklinghausen* v. *Dempster,* 34 App. D. C. 474, 476, 477."

Likewise, in *Smith* v. *Goodyear Dental Vulcanite Co. et al.,* 93 U. S. 486, 501, this Court treated a later (1864) application as "continuous" with respect to an earlier (1855) application to avoid an alleged public use by others than the patentee himself which occurred in 1859, or more than two years prior to the second application but not more than two years prior to the first application.

It is the firmly settled law that as between copending applications a claim in the later-filed case directed to subject matter disclosed in the earlier-filed case is entitled to the benefit of the filing date of the earlier-filed case as against allegations of a two-year public use bar *Godfrey* v. *Eames,* 1 Wallace 317; *Singer* v. *Braunsdorf,* 7 Blatchf. 521, Fed. Case No. 12,897; *Novadel Process Corp.* v. *J. P. Meyer & Co.,* 35 F. (2d) 697 (C. C. A. 2); *General Electric Co.* v. *Independent Lamp & Wire Co., Inc.,* 267 F. 824, 836; *Hayes-Young Tie Plate Co.* v. *St. Louis Transit Co.,* 137 F. 80, 82 (C. C. A. 8); *Edison* v. *Allis-Chalmers Co. et al.,* 191 F. 837, 843.

Plaintiffs thus find themselves in a highly inequitable position which has become glaringly apparent from the concurrent holdings of the lower courts after remand of the identity of the inventions of '149 and '150. However, in view of the mandate of this Court, which directed dismissal of the bill as to '150, they are unable to obtain relief other than by way of review by this Court.

Conclusion

For the foregoing reasons it is believed that this Court should grant the writ of certiorari as prayed for in the petition to the end that the fundamental questions of patent law here involved may be reviewed and settled by this Court and the judgment of the court below reversed.

Respectfully submitted,

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